

Copyright Uncharted waters

Pirates risk paying court costs

■ Hannah Francis

The studio pursuing Australians who allegedly pirated its film *Dallas Buyers Club* could end up spending hundreds of thousands of dollars to recover just \$20 compensation per case if it chooses to pursue individuals through the courts, a leading intellectual property lawyer says.

In a landmark Federal Court case on Tuesday against several Australian internet service providers including iiNet, Dallas Buyers Club LLC won a "preliminary discovery" case to obtain the names and physical addresses of 4637 customers it alleged had downloaded its film, for the pur-

poses of suing them for copyright infringement.

However Shelston IP Lawyers partner Mark Vincent said unlike in the US, Australia did not have statutory damages provisions prescribing a minimum amount of monetary compensation, and an Australian court would likely order damages only for the cost of legally obtaining the film – about \$20.

But Mr. Vincent said a defendant would still face considerable court costs if they lost a case.

Marque Lawyers managing partner Michael Bradley, representing Dallas Buyers Club, said the pursuit of pirates in Australia was about "seeking to send a much bigger message to consumers

about the broader issue of unauthorised downloading and uploading of copyright material".

The comments come as the telco industry on Wednesday finalised a proposed anti-piracy scheme that would see Australian ISPs give pirates "three strikes" before copyright owners can seek a preliminary discovery order to obtain their details and sue them.

Under the new system, copyright owners will send lists of Internet Protocol (IP) addresses that belong to alleged illicit downloaders to a telco industry body.

This will be cross-checked against the IP addresses of all Australian internet users and warning letters will be sent out.

Consumer groups CHOICE and ACCAN warned the code would pave the way to so-called "speculative invoicing" in Australia which had seen rights holders such as Dallas Buyers Club LLC send individuals overseas letters demanding thousands of dollars.

But on Tuesday Justice Nye Perham ordered that any draft letter to alleged copyright infringers be reviewed by him first.

Speaking of the industry code more generally, Mr Vincent said CHOICE's view around speculative invoices becoming a problem was "plainly wrong" as the federal court had set a precedent with Tuesday's ruling.

With David Ran

How the Dallas Buyers Club case will affect you

■ Dominic Woolrych

The *Dallas Buyers Club* court case is a tipping point for online piracy in Australia, with the balance of power shifting from the ISPs and end-users back to the rights holders. In a year, I expect illicit downloads will be down by half.

This has profound implications for internet users, but there is wriggle room for downloaders – particularly those who don't use BitTorrent – to obtain pirated content. The unreliability of the data and the difficulty of linking IP addresses to individual people will also make cases difficult for rights holders.

What does this mean for downloaders? This case sets a precedent in Australia for ISPs to hand over customer details to rights holders. It is a huge issue for illicit downloaders because it now makes it more difficult to download content in secret. The film industry saw the music industry get smashed by piracy and they do not want to go the same way.

The enforcement strategy of the rights holders is two-fold: part one is to go hard on people with enforcement letters (speculative invoicing); part two is a new code proposed to the Australian Communications and Media Authority by rights holders and ISPs.

Who is being targeted? At this stage, only users on the BitTorrent platform are being targeted. Users who share files (known as seeders) – “make available online” files and content that infringe copyright are liable.

How do you get caught if you don't seed? Maverick Eye (the technology that tracks illicit downloads) works by pretending to be a BitTorrent user and requests files. It then passes the file to its original source and records the IP address that is making available online. iiNet ar-



Jared Leto and Matthew McConaughey in a scene from *Dallas Buyers Club*.

gued that “slivers” of files shared peer-to-peer using BitTorrent were not substantial and therefore not copyright infringement. But the judge ruled only a “sliver” of file needed to be shared for copyright to be infringed. Therefore, it is only sharers who are liable. However, most BitTorrent programs automatically default users to seeders and often require and encourage all user to share files. More often than not you will be a “leecher” and a “seeder”.

Can they prove that an individual downloaded the content? They will struggle to prove you actually downloaded it, especially if there is more than one person in your house. Under Australian law, internet users are not required secure their inter-

net connection (for example their Wi-Fi). Therefore it can be argued that another individual downloaded the infringing copyright.

The inability to prove which individual accessed your internet coupled with the unreliability of Maverick Eye will mean that proving illicit downloading will be difficult.

What is speculative invoicing?

One of the main concerns of the judge in the case was the use of speculative invoicing. Speculative invoicing is a practice not yet seen in Australia to a great extent. The practice has caused significant problems in the US and UK where it has been widely used by rights holders and their legal representatives. In the US and UK, rights holders engage in the mass distribution of

template style letters of demand to suspected infringers. These letters are used to exert pressure on infringers to pay-up or else. In the US these letters are sent demanding \$US7000 (claiming they could get \$US150,000 if it went to court) and people paid the \$US7000 because they were fearful of how much a court case would cost.

But these letters may have little legal effect under Australian law.

The Federal Court has ordered rights holder letters are to be received by the court before they are sent to suspected infringers. It is hoped that this will lower the risk of “pay-up or else” tactics being used.

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